NO. 56645-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AKEEM MOORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

BRIEF OF APPELLANT

ERIN MOODY
Attorney for Appellant

NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121
206-623-2373

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A. INTRODUCTION

To obtain a conviction for rape of a child, the State must prove the crime occurred, "in whole or in part," within the State of Washington. RCW 9A.04.030. The State charged Akeem Moore with two counts of rape of a child and, consistent with the jurisdictional requirement, instructed his jury that it could not convict unless it found beyond a reasonable doubt that "this act occurred in the State of Washington." CP 44, 48.

The evidence overwhelmingly supported the conclusion that, if count 1 occurred, it occurred in Oregon. And the evidence was equally consistent with the conclusions that count 2, if it occurred, occurred in either Washington or Oregon. The jury nevertheless returned guilty verdicts on both counts.

Because due process demands that the inferences necessary to a criminal conviction be based on likelihood, not mere possibility, the evidence was insufficient to prove the State's jurisdiction over Mr. Moore's alleged offenses. This

Court must therefore reverse both Mr. Moore's convictions and dismiss the charges with prejudice.

B. ASSIGNMENT OF ERROR

The evidence was insufficient to prove either count occurred in Washington State; the trial court therefore erred by denying the defense halftime motion to dismiss both counts with prejudice.

Issues Pertaining to Assignments of Error

1. Where the alleged victim testified that count 1 occurred in Oregon, and the circumstantial evidence overwhelmingly supported the inference that this was correct, could a reasonable jury have concluded, beyond a reasonable doubt, that count 1 occurred in Washington? (No, the evidence was therefore insufficient to convict Mr. Moore of count 1.)

2. Where the alleged victim testified that count 2 occurred in Oregon, and the circumstantial evidence was equally consistent with the conclusion that count 2 occurred in Oregon and the conclusion that it occurred in Washington, could a

reasonable jury conclude, beyond a reasonable doubt, that count 2 occurred in Washington? (No, the evidence was therefore insufficient to convict Mr. Moore of count 2.)

3. Where the evidence was insufficient to prove either count occurred in Washington, must Mr. Moore's convictions be reversed and dismissed with prejudice? (Yes. To secure a criminal conviction, the State must prove its jurisdiction beyond a reasonable doubt.)

4. Even if the State were not generally required to prove its jurisdiction over a child rape prosecution, does the law of the case doctrine require such proof in Mr. Moore's case? (Yes. Mr. Moore's jury was instructed that it could convict him only if it found the offense occurred in Washington State.)

C. STATEMENT OF THE CASE

Akeem Moore and Candice Ferguson have two children together, C.F. and J.M. RP 478, 506. C.F. turned five in June of 2019; J.M. turned six that year. RP 114, 471, 473, 560. Both parents were periodically absent, and the children were sometimes

cared for by foster parents or their maternal grandmother, Sandra. RP 506-11, 516-17.

Sandra lived at the Springbrook Lane townhomes in Lakewood for almost a year, ending in April of 2019. RP 512-514, 541, 598-99. At first she lived there by herself, but at some point her daughters, Tabitha and Candice; Tabitha's daughter, T.C., and boyfriend, Neomyah; and C.F., J.M., and their half-brother, R., moved in with Sandra. RP 514-15, 598-99.

In April of 2019, the family could no longer afford rent at Springbrook Lane, and they decided to leave. RP 518, 598-99. Sandra, Tabitha, Neomyah, T.C., and R. went to Arkansas to stay with extended family. RP 518-19, 598. Mr. Moore, Candice, C.F., and J.M. went to Oregon. RP 518, 598. The Oregon group left Washington about a week before the Arkansas group did. RP 519.

Sandra and the rest of her group stopped in Oregon on their way to Arkansas. RP 518-19, 599-600. Sandra did not like Mr. Moore and did not want Candice to be with him. RP 540-41. The Arkansas group went to an apartment there where Mr. Moore,

Candice, C.F., and J.M. were living, and they tried to convince Candice to bring the children to Arkansas. RP 519-20, 599-600. The Arkansas group was not allowed to go inside the Oregon apartment, so Candice came out and spoke with them at their vehicle. RP 519-20. Candice declined to go with the Arkansas group and instead remained in Oregon with Mr. Moore and the two kids. RP 519-20.

About one month later, Candice, C.F., and J.M. flew to Arkansas to join Sandra and the rest of the family there. RP 521-22, 601. Child Protective Services provided the airline tickets, after an incident of domestic violence. RP 513-14, 521, 601. All the family members (except for Mr. Moore) remained in Arkansas until September of 2019. RP 601.

One day in Arkansas, C.F. approached a police officer in Sandra's presence and told him, "'My daddy put his pee-pee in my pee-pee.'" RP 523. Sandra described this statement as "just real random." RP 523. The officer told Sandra to "take [C.F.] and get

her checked out," but there was apparently no follow-up. RP 523-24, 546-47.

In September of 2019, Sandra, Tabitha, Candice, T.C., C.F., J.M., Sandra's brother, and the brother's wife all left Arkansas and headed back to Washington State. RP 524-25. They spent a few days in Las Vegas on the way. RP 525-26. R. remained permanently in Arkansas with his uncle, Brandon. RP 512, 524-25.

When the family arrived back in Washington, they were homeless and stayed a few days in a hotel. RP 526. After that, Sandra and her brother drove back to Arkansas, and then to Colorado, and then Sandra returned to Pierce County. RP 526-27. During this period, C.F. and J.M. were with their mother (Candice), and Sandra thought they were likely with Mr. Moore, too. RP 527-28, 547.

In October of 2019, Sandra and Tabitha got an apartment together in Tacoma, and C.F. and J.M. moved in with them. RP 527-28, 605. One day, when Sandra took the children to get ice

cream, they drove past a Motel 6 and C.F. told J.M. and Sandra, "'That's where it happened.'" RP 528-29. Sandra said she asked C.F., "'What happened?'" and C.F. replied, "'My daddy put his pee-pee in my pee-pee again.'" RP 529.

C.F. made such a comment on at least two occasions, while driving past two different Motel 6's. RP 558-59. Sandra believed it was the motel's sign that prompted C.F. to say this, and that C.F. meant that the incident occurred at some Motel 6, but not at any specific location she pointed out. RP 557-59.

In response to C.F.'s statement about the Motel 6, Sandra took C.F. to Mary Bridge Children's Hospital, where she was physically examined on October 18, 2019, and interviewed by child forensic interviewer Keri Arnold on October 22, 2019. RP 725, 758, 677.

C.F. told Ms. Arnold that her father "put his pee-pee in my pee-pee . . . at the hotel . . . and the old house." Ex. 1-A at 2:04:01 to 2:04:22; see also 2:07:40 to 2:07:46 and 2:12:14 to 2:12:21. When Ms. Arnold asked, "Where is the old house?," C.F.

answered, "Far away." Ex. 1-A at 2:04:22 to 2:04:27. She also described her location at the "old house" as "a new one . . . you take a left and a right . . . and . . . it's a number one, so you have to get a phone at the office." Ex. 1-A at 2:07:43 to 2:08:03.

When Ms. Arnold asked, "When daddy stuck his pee-pee in, where were you at the house?," C.F. answered, "Because my . . . mom dropped me off with him . . . and then I stayed with my mommy and my daddy and J." Ex. 1-A at 2:08:08 to 2:08:35. She also said this happened on "his bed in his bedroom." Ex. 1-A at 2:16:56 to 2:17:04.

When Ms. Arnold asked, "Who as at the house when your daddy stuck his pee-pee in your pee-pee?," C.F. answered, "My mom, and [J.M.]. He was sleeping in his room, though." Ex. 1-A at 2:19:45 to 2:19:55.

When Ms. Arnold asked, "Did daddy stick his pee-pee in your pee-pee at just one old house, or was it more than one old house?," C.F. answered, "One old house and one hotel . . ." Ex. 1-A at 2:25:56 to 2:26:21; see also Ex. 1-A at 2:32:59 to 2:33:14.

When Ms. Arnold asked C.F. to "tell me about the old house," C.F. said, "the old house . . . is with brown stuff in there and there's a kitchen we got all the stuff out of the car." Ex. 1-A at 2:26:44 to 2:27:27. When Ms. Arnold asked, "Who lived at the old house?," C.F. answered, "My dad and my mom and [J.M.] and me." Ex. 1-A at 2:27:33 to 2:27:40.

When Ms. Arnold asked, "When did daddy stick his pee-pee in your pee-pee?," C.F. answered, "It was this Friday." Ex. 1-A at 2:34:29 to 2:34:39. Ms. Arnold replied, "Okay. When?" Ex. 1-A at 2:34:39 to 2:34:41. C.F. responded by giving a long account of sneaking out of the house ("and my mom said, 'Shhhhh, be quiet'"), and going to the airport with her mother and J.M., where they flew to see "[R.] and nana . . . and all the families." Ex. 1-A at 2:34:41 to 2:36:02.

When Ms. Arnold asked, "When daddy stuck his pee-pee in your pee-pee, where did [R.] live?," C.F. answered, "With Brandon." Ex. 1-A at 2:37:42 to 2:37:54.

Four and half months later, the State charged Mr. Moore with two counts of first-degree rape of a child, allegedly occurring between January and October of 2019. CP 3-4, 21-22; RP 611-12.

1. Child witness competency hearing: the State argued C.F. was a competent witness who gave consistent accounts of the alleged offenses over time

The trial court held a hearing on C.F.'s and J.M.'s competency to testify, and on the admissibility of their hearsay statements. RP 31-181. It heard testimony from both children, from Sandra and T.C., and from Ms. Arnold. RP 31-149.

Sandra testified that J.M. did not talk about his memories very often, particularly if they were bad memories, but that C.F. had a "[r]eally good" memory and "a lot of vivid memories." RP 115. Ms. Arnold testified that J.M. had difficulty sitting still for the interview, talking about "bad things," and agreeing to answer truthfully. RP 55-56. But she said that C.F. was calm throughout her interview, and she believed C.F. understood her questions and gave coherent responses. RP 55, 68-69.

The State argued that both children demonstrated the ability to form "an accurate impression," and to describe "historical things" that could be verified by other witnesses. RP 155-56. The prosecutor noted that C.F., in particular, had demonstrated the ability to correct misstatements (instead of simply parroting back what her interrogator said), and to give consistent accounts of the same past event over time. RP 157-58. He said her account of the alleged abuse ("daddy . . . put his pee-pee in my pee-pee") had been consistent when she talked to Sandra, the police officer in Arkansas, Ms. Arnold, the medical examiners, and defense counsel. RP 157-58, 460.

The trial court found both children competent to testify, noting that C.F. was "very appropriate on the witness stand," and appeared to have "had the capacity at the time [of the forensic interview] to receive an accurate impression of what it is she claims that occurred to her." RP 175-76.

2. Opening arguments: the State argued that C.F. was almost always consistent in her descriptions of the alleged crimes, but once voiced "a different iteration of this allegation," to her cousin

In his opening statement, the prosecutor told the jury: "[C.F.] has, through the course of the pendency of this case, been steadfast in her assertion that he put his pee-pee in my pee-pee." RP 460. He said she made the assertion first in Arkansas, in front of her grandmother and a police officer; then after she returned to Washington, while she was driving with her grandmother; and a third time in a forensic interview when law enforcement opened an investigation. RP 460-62.

The prosecutor also told the jurors they would hear from C.F.'s older brother, J.M., that "he witnessed one of those acts of sexual abuse, of child rape that [C.F.] describes." RP 463. And he said they would hear from other family members to establish a timeline of the relevant events, including from C.F.'s older cousin, T.C., who would testify to hearing "another iteration of this allegation." RP 464.

3. Trial testimony: C.F. repeatedly testified that she had never told her cousin about the alleged offenses

The jury heard a stipulation that, "From December 1st, 2016 to January 1st, 2019, the defendant was unavailable and could not have had contact with [C.F.]" RP 662. The jury also watched the video of C.F.'s forensic interview with Ms. Arnold, and it heard testimony from C.F., J.M., Sandra, Tabitha, T.C., Ms. Arnold, a forensic nurse, and two law enforcement officers. RP 470-610, 649-702, 717-33, 757-64; Ex. 1-A.

C.F. testified that her dad, Akeem, touched her privates in a Motel 6, and that she did not tell anyone about it. RP 478-79. She said it also happened another time, in a little house when the other people present were "my dad and my mom and my brother, [J.M.]" RP 478-79, 483, 486.

When asked where the Motel 6 was, C.F. testified, "It was in, I think, Oregon." RP 479. When asked where the little house was, she testified, "It was like Motel 6, but we hurried up and went

over there." RP 479. She also testified, correctly, that she was giving her testimony in Tacoma, Washington. RP 479.

C.F. testified that, at the Motel 6, her father was on top of her, on the bed, and that when he put his pee-pee in her pee-pee it hurt. RP 482-83. She testified that, at the little house, she was laying on the living room couch, and "then somebody picked me up and dragged me into my dad's room," where "[h]e put me in the closet for no reason, and then I woke up on the bed" and "[h]e put his pee-pee in my pee-pee." RP 483. C.F. twice clarified that the bed was, "his bed," meaning Mr. Moore's. RP 483. She said her mom was sleeping on her dad's bed when this occurred. RP 484-85.

Finally, C.F. testified that she told "the police officers and the doctors," her aunt, her grandmother, and J.M. about these things. RP 486. But she testified, repeatedly, that she did not tell her cousin, T.C. RP 497-98.

On cross-examination, C.F. repeated that the Motel 6 was in Oregon, and said the little house was in the same area. RP 490, 492.

C.F. also gave a detailed account of her living arrangements immediately after the family returned from Arkansas. RP 490-92. She explained that she and J.M. lived with their mother and Mr. Moore during this period, and that they first lived in a car, then found a house, and then went to a Motel 6 after the house became too expensive to afford. RP 490-92. She said this Motel 6 was different from the Motel 6 in Oregon, and that "what happened with [her] dad" happened in Oregon. RP 492.

On redirect, the prosecutor asked C.F. if she remembered stating, in an earlier interview, that "when this happened . . . we weren't in Washington, we were in Tacoma." RP 501. She said she did remember, and she agreed "this happen[ed] in Tacoma." RP 501. On re-cross, C.F. testified that it happened in Oregon, and that she was not sure where it happened. RP 502-03.

Sandra testified that C.F. and J.M. "remember everything," including the Springbrook home, which they referred to in retrospect as "our mansion house." RP 532.

Sandra testified that it was not uncommon for the family to stay in motels when they were between permanent homes, and that to her knowledge C.F. and J.M. stayed at multiple different motels with their mother. RP 550. She also testified that she "wouldn't know" how many times, or specifically where, they stayed in motels, but that they "[p]ossibly" stayed in a Motel 6 in the Tacoma area on more than one occasion. RP 550-51, 556-57.

J.M. testified that Mr. Moore "put his pee-pee in [C.F.]'s pee-pee" in an apartment where the only people present were "Mommy, dad, and me, and [C.F.]" RP 569-70.[1] He said he knew this because he saw it; because C.F. told him; that he was asleep; that it happened before he went to bed; that he only heard it and did not see it; that when it happened they were standing on the bed,

[1] This was consistent with J.M.'s statements in pre-trial interviews. RP 569.

laying on the bed, or sitting on a couch that was 15 feet tall or 40 feet tall; that he heard his nana talk about it "like 30 times," that he didn't want to tell the lawyers about it because it was gross, and "they were grownups," and he was talking about his mom and dad; that he didn't remember where it happened, and that it wasn't in an apartment, "I think it was 616." RP 569-82.

T.C. testified that, at some point between two and eight years prior to trial, C.F. whispered to her either that her dad "hurt her where her vagina was and where other places that he wasn't supposed to touch her," or that, "'my dad touched me and hurt me in inappropriate places.'" RP 588-92, 595-96. T.C. said she did not remember the exact wording C.F. used, and that T.C. had chosen the word, "inappropriate," after hearing it from one of the adults. RP 592-94. She said that, by the time of the trial, she had talked to C.F. about this "a lot of times." RP 593.

Significantly, T.C. testified that C.F. made the first statement at "Candice's house," when "Mom, nana, and Candice were there too," and while they were all standing "outside by the

Jeep." RP 589, 592. T.C. said she told her mother and Sandra about it, but that she could not remember when she told them. RP 594.

T.C.'s mother, Tabitha, testified that T.C. relayed C.F.'s statement to her just as they "were getting ready to go to Arkansas." RP 602-03. Tabitha said, "As soon as they drove off, my daughter was like, mom, . . . why did you let them leave?" and then explained that "Akeem had touched [C.F.] inappropriately." RP 603.

Tabitha also testified that the Springbrook home was "all [Sandra's] apartment," and that Candice lived there from January through April of 2019 (until the family split up and went to Oregon and Arkansas). RP 597-99.

Finally, Tabitha testified that, when the family returned to Washington in September of 2019, Candice and Mr. Moore stayed in a Motel 6 for at least one night. RP 603-04. She believed that during this period they were also staying at Mr. Moore's mother's

home, because she dropped them off there a few times. RP 604-05.

Tacoma Police Detective Christie Yglesias testified that Mr. Moore told her, in an interview, that C.F. and J.M. often stayed in hotels with their mother and other family members, and that he once visited them in one such hotel. RP 656. She also said Mr. Moore told her that the children often stayed at his mother's house when he was not there, and that he once stayed there at the same time but slept in the car. RP 655.

Finally, Tacoma Police Officer Corey Ventura testified that, when he interviewed Sandra at Mary Bridge Children's Hospital, she told him that C.F. had said to her, "I was sleeping when Daddy was touching me. We were at 6 Motel, and daddy gave me ice cream." RP 764.

4. Defense motion to dismiss: the State conceded "this might have happened in Oregon," but argued that C.F.'s hearsay statement to T.C., and the fact that she "pointed to specific motels" in Pierce County, proved "it happened here as well."

After both parties rested, the defense moved to dismiss both counts for insufficient evidence of the State's jurisdiction, *i.e.*, that they took place in Washington. RP 769-71. Counsel pointed out that C.F. testified that both the "old house" and the Motel 6 were in Oregon, and he argued that a reasonable interpretation of Tabitha and T.C.'s testimony was that C.F.'s very first alleged disclosure (to T.C.) occurred in Oregon, when the Arkansas group stopped at Candice's apartment there, and she came out to talk to them at their car. RP 770-71. He concluded:

> Based on lots and lots of questions about where those various things were, both in interviews, follow-ups in the interviews . . . from 2019 admitted none of those things, describe any statements clarifying that, in fact, any alleged incident occurred within the state of Washington.

RP 771-72.

The prosecutor conceded that "It might have happened in Oregon. It possibly did." RP 774. But he argued, "children are generally not very good at testifying as to where things happened,"[2] and "we have evidence it happened here as well." RP 774. According to the prosecutor, this evidence was (1) that Mr. Moore had access to the children between January and April of 2019, "while they're in Washington living at Springbrook Lane Apartments or townhome"; (2) that C.F. whispered to T.C. that her daddy touched her vagina "before they leave the state of Washington"; and (3) that C.F. "pointed out specific motels" in the Tacoma area and "said that's where it happened." RP 773-74.

The trial court denied the motion. RP 774. The court explained that, before Mr. Moore and the children left for Oregon

[2] It is not clear what evidence the prosecutor was relying on for this assertion. At trial, Ms. Arnold testified that a forensic interviewer will look for details in a child's statement, such as "how their body felt . . . or other details about locations where it happened," to rule out "coaching." RP 674. Otherwise, Ms. Arnold presented no testimony about children's general capacity for recalling or describing locations.

> they had been living in various places in Pierce County in a car, in motels, in - - for a time in the old house, which I think a jury could conclude was maybe the grandmother's house and/or another home that they were residing in.

RP 774. The court agreed with the prosecutor that C.F.'s statement to T.C. "prior to the trip to Arkansas," and the statements about Motel 6's in Pierce County, were circumstantial evidence that "the jurisdictional element has been met." RP 775.

5. Closing arguments: the State conceded that C.F. never identified "a specific Motel 6" as the site of the alleged offenses, insisted (contrary to the trial testimony) that C.F. did tell her cousin about the first alleged offense, and argued that "children aren't often very good at time frames or specific locations"

The jury was instructed that it had to be unanimous that the acts supporting each count were "separate and distinct from those acts" supporting the other, and that with respect to each count it could convict only if the jurors "unanimously agree as to which act has been proved." CP 44, 47, 48.

In closing argument, the prosecutor told the jury that the "old house" was the Springbrook Lane townhome in Lakewood.

RP 790-92. Citing T.C.'s testimony about the inappropriate "touching," the State alleged that the first incident of intercourse (supporting count 1) occurred in the "old house" before the family left Washington. RP 789-90. The prosecutor told the jury that C.F.'s statement to T.C., which Tabitha recalled, could mean only one of two things: either "the old house incident . . . [supporting] Count I had to occur before they got to Oregon" or that "there has to be a conspiracy between Sandra, Tabitha, probably involving [T.C.] . . ." RP 824-25, 838.

Defense counsel pointed out that it would be odd for C.F. to refer to the Springbrook Townhomes as "the little house" or "the old house," but never as "nana's house." RP 810-11. He also noted that, in the 2019 forensic interview, Ms. Arnold asked C.F. when daddy put his pee-pee in her pee-pee, and that C.F. responded by narrating the events immediately surrounding the flight from Oregon to Arkansas. RP 817-18. Finally, defense counsel pointed out that C.F. described the "old house" as having

"a kitchen and got all the stuff out of the car," suggesting a place the family arrived after a road trip. RP 818-19.

In rebuttal, the prosecutor conceded that C.F. had not identified "a specific Motel 6" where any incident occurred, and that "children aren't often very good at time frames or specific locations." RP 826.

The jury convicted Mr. Moore as charged. CP 52-53. The trial court imposed concurrent exceptional sentences of 380 months to life, based on the "free crimes" aggravator. RP 865-66; CP 86, 90. This was 62 months above the high end of the standard range. CP 84-90; RCW 9.94A.510, .515. The court explained that this was necessary to ensure Mr. Moore was punished for both counts. RP 865-66.

Mr. Moore timely appealed. CP 105.

D. ARGUMENT

1. MR. MOORE'S CONVICTIONS MUST BE REVERSED AND DISMISSED WITH PREJUDICE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE EITHER OFFENSE OCCURRED IN WASHINGTON STATE

RCW 9A.04.030 defines state criminal jurisdiction and, as relevant here, gives the superior court jurisdiction over "'a person who commits in [Washington] state any crime, in whole or in part.'" State v. Norman, 145 Wn.2d 578, 588-89, 40 P.3d 1161 (2002) (quoting RCW 9A.44.030(1)). "'Proof of jurisdiction beyond a reasonable doubt is an integral component of the State's burden in every criminal prosecution.'" Id. at 589 (quoting State v. Squally, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997)).

Because location-based jurisdiction always involves a factual question, the jury must be instructed to convict only where it finds, beyond a reasonable doubt, that an act constituting an element of the crime occurred within the State of Washington. State v. Lane, 112 Wn.2d 464, 476, 771 P.2d 1150 (1989); State v.

Svenson, 104 Wn.2d 533, 542, 707 P.2d 120 (1985); see WPIC 4.20 ("Jurisdiction" and "Jurisdictional element—superior court").

Consistent with these rules, Mr. Moore's jury was instructed that to convict him of each count charged:

> each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 1, 2019, to October 18, 2019, the defendant had sexual intercourse with [C.F.], separate and distinct from those acts alleged in [the other] count . . .;
>
> (2) That [C.F.] was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
>
> (3) That [C.F.] was at least twenty-four months younger than the defendant; and
>
> (4) That this act occurred in the State of Washington.
>
> . . .

CP 44, 48.

In a sufficiency challenge on appeal, all reasonable inferences must be drawn in the prosecution's favor. State v. Aten, 130 Wn.2d 640, 667, 927 P.2d 210 (1996). "However, inferences

based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

Consistent with this rule, courts "will not infer a circumstance when no more than a possibility is shown." State v. Jameison, 4 Wn. App. 2d 184, 198, 421 P.3d 463 (2018). Instead, "Washington law . . . demands that inferences in the criminal setting be based only on likelihood, not possibility." Id. at 200. "When an inference supports an element of the crime, due process requires the presumed fact to flow more likely than not from proof of the basic fact." Id. This is because, "[w]hen evidence is equally consistent with two hypotheses, the evidence tends to *prove* neither." Id. at 198 (citing Stambaugh v. Hayes, 44 N.M. 443, 103 P.3d 640 (1940) (emphasis added); State v. Rehn, noted at 21 Wn. App. 2d 1032, 2022 WL 837054, at *4.[3]

[3] Under GR 14.1, Mr. Moore cites this unpublished decision for whatever persuasive authority this Court deems appropriate.

Under this standard, the evidence would have been insufficient to prove Mr. Moore committed Count 1 in Washington if the evidence was equally consistent with the conclusion that this incident occurred in Oregon. Id. But the evidence was not equally consistent with both conclusions; on the contrary, the evidence overwhelmingly supported an inference that the "old house" incident occurred in Oregon.

The evidence supporting an inference that the "old house" incident occurred in Oregon included:

- C.F.'s assertion, in the 2019 forensic interview, that this incident occurred in a house where she lived with her mom, J.M., and Mr. Moore. Ex. 1-A at 2:27:33 to 2:27:40. By contrast, Sandra testified that both children remembered the Springbrook Lane unit vividly, and referred to it as the "mansion house." RP 532. And it was undisputed that, while Mr. Moore never lived at the Springbrook Lane home, numerous other family members did. RP 514-15, 598-99. As

defense counsel correctly pointed out in closing, it would be very odd for C.F. to suddenly start referring to the Springbrook Lane home as a home where she lived with her biological parents and J.M., when it was a home Sandra occupied first, and which she shared with a large and close extended family.

- C.F.'s statement, in the forensic interview, that the "old house" incident occurred close in time to the flight to Arkansas. Ex. 1-A at 2:34:41 to 2:36:02. Ms. Arnold made considerable efforts to elicit information about when the "old house" incident occurred; in response, C.F. provided a detailed narrative that unmistakably describes sneaking away and going on an airplane to see family in Arkansas. At trial, it was undisputed that Candice and the children flew from Oregon to Arkansas after a "domestic incident." RP 513-14, 521, 601.

- C.F.'s statement, in the forensic interview, that the incidents occurred when [R.] lived with Brandon. Ex. 1-A at 2:37:42 to 2:37:54. At trial, it was undisputed that [R.] lived at the Springbrook Lane home with the rest of the family (excluding Mr. Moore), and that he lived with Brandon only after Sandra, Tabitha, and T.C. arrived in Arkansas. RP 512, 514-15, 518-19, 524-25, 598-99.
- C.F.'s testimony that both incidents occurred in Oregon. RP 479, 490, 492. While C.F. also testified that she previously stated it happened in Tacoma, and that she could not remember where it happened, those statements were at the prosecutor's prompting. RP 501-03. In the forensic interview, which occurred much closer in time to the alleged incidents, C.F. told Ms. Arnold that the "old house" was "far away." Ex. 1-A at 2:04:22 to 2:04:27. She then appeared to describe a complex with a central office. Ex. 1-A at

2:07:43 to 2:08:03. No trial testimony indicated any such feature at Springbrook Lane.

- C.F.'s statement in the forensic interview, and subsequent testimony, that the incident occurred on her "dad's bed" in "his bedroom." Ex. 1-A at 2:16:56 to 2:17:04; RP 483-85. As noted, Mr. Moore never lived at the Springbrook Lane home, so it would be strange for C.F. to say he maintained a bedroom there.

Against all this evidence, the State argued the "old house" incident occurred at the Springbrook Lane townhome. RP 790-92. In support of that argument, the State offered Tabitha's and T.C.'s testimony that, at some point before they left for Arkansas, C.F. told T.C. that her father had touched her inappropriately. RP 588-92, 595-96, 602-03. But, even assuming this statement occurred in Washington rather than in Oregon,[4] evidence of "touching" is

[4] Tabitha's and T.C.'s testimony was conflicting on this point. Tabitha testified that T.C. relayed C.F.'s statement to her "as

not sufficient to prove the "sexual intercourse" element of child rape. See State v. Weaville, 162 Wn. App. 801, 814-15, 256 P.3d 426 (2011).

Indeed, the State repeatedly argued, both at the child competency hearing and at trial, that C.F. had consistently described both incidents with the phrase, "daddy put his pee-pee in my pee-pee." RP 157-58, 460. But the State offered no evidence that she made such a statement to T.C. And, in direct contradiction to the State's theory, C.F. was adamant that she had never told T.C. about the "pee-pee" incidents she disclosed to the police, the doctors, her aunt, Sandra, and J.M. RP 497-98.

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soon as they drove off," seemingly referring to Mr. Moore, Candice and the children departing for Oregon. RP 603. But T.C. testified that C.F. whispered the statement in her ear at "Candice's apartment," while she, Tabitha, Candice, and Sandra were standing outside by the Jeep. RP 589, 592. T.C.'s recollection implies the encounter the women had when the Arkansas group stopped in Oregon to try to persuade Candice to come with them. RP 519-20. At trial, Sandra testified that the Arkansas group was not allowed inside the Oregon apartment, so Candice came out and spoke with them at their vehicle. RP 519-20.

Given the overwhelming circumstantial evidence that the first alleged incident occurred in Oregon, no reasonable jury could have found proof of Washington's jurisdiction beyond a reasonable doubt. This Court must therefore reverse Mr. Moore's conviction for Count 1 and dismiss that charge with prejudice.

While there was slightly less evidence that count 2 (the Motel 6 incident) occurred in Oregon, the evidence was also insufficient to establish Washington's jurisdiction over that count beyond a reasonable doubt. As noted, C.F. repeatedly testified that the Motel 6 incident occurred in Oregon. RP 490, 492. The State sought to diminish this testimony by arguing, contrary to its position at the child competency hearing, that C.F. must have been confused. RP 774.

The State conceded that C.F. had never identified a specific Pierce County Motel 6 as the site of abuse. RP 826. And the only evidence supporting the theory that the Motel 6 incident occurred in Washington was Sandra's testimony that Candice sometimes stayed in motels with the children, and that one of these motels

could "possibly" have been a Motel 6, and Tabitha's testimony that Candice and Mr. Moore stayed in a Motel 6 with the children for one night after the family returned from Arkansas. RP 550-51, 556-57, 603-04. It was undisputed that no adult witness knew where the Oregon group stayed between leaving Tacoma and moving into the Oregon apartment. See RP 518-19, 599-600.

With respect to count 2, the evidence was equally consistent with Washington jurisdiction and Oregon jurisdiction. Thus, it was insufficient to prove either. Jameison, 4 Wn. App. 2d at 198; Rehn, 2022 WL 837054, at *4.

Because the evidence was insufficient to prove the State's jurisdiction over either count, this Court must reverse both convictions and remand for dismissal with prejudice. State v. Rogers, 146 Wn.2d 55, 60, 43 P.3d 1 (2002); Svenson, 104 Wn.2d at 535, 543. If this Court concludes that the evidence was insufficient as to only one count, it must remand for vacation of that conviction and resentencing on the other.

2. EVEN IF THE STATE WERE NOT GENERALLY REQUIRED TO PROVE ITS JURISDICTION OVER A CHILD RAPE PROSECUTION BEYOND A REASONABLE DOUBT, THE LAW OF THE CASE DOCTRINE REQUIRED IT TO DO SO AT MR. MOORE'S TRIAL

In State v. Karpov, our Supreme Court unanimously held that, where the trial court dismisses a case with prejudice, at the close of the State's evidence, for failure to prove jurisdiction, this "judicial acquittal" bars retrial under principles of double jeopardy. 195 Wn.2d 288, 291-93, 296-99, 458 P.3d 1182 (2020). In dicta, five Justices also concluded that proof of jurisdiction is not an "essential element" of every criminal offense. Id. at 293-96.

The meaning of this dicta is not entirely clear,[5] and Mr. Moore does not expect the State will argue that it forecloses his sufficiency challenge. If the State does make such an argument,

[5] In a single sentence, the Karpov majority stated that jurisdiction was not an "essential element" of every criminal offense but *was* "an '"integral component"' of the State's case, *which it must prove*." 195 Wn.2d at 295 (quoting Norman, 145 Wn.2d at 589 (quoting Squally, 132 Wn.2d at 340 (citing Svenson, 104 Wn.2d at 542))). The majority also cited Lane, 112 Wn.2d at 468, with approval. Karpov, 195 Wn.2d at 295.

however, this Court should decline to address it. Even if Karpov precluded relief under a traditional sufficiency analysis (which it does not), Mr. Moore is entitled to relief under the law of the case doctrine.

Under the "law of the case" doctrine, the State assumes the burden of proving every element in a "to convict" instruction to which the prosecution does not object. State v. Hickman, 135, 102, 954 P.2d 900 (1998). This rule obtains even where the element in question was added in error and is in fact unnecessary to the conviction. Id. A defendant may challenge the sufficiency of the evidence to prove such an added element and, where the evidence was insufficient, the remedy is reversal and dismissal with prejudice. Id. at 102-03.

As noted, Mr. Moore's jury was instructed that it could convict only if it found each count occurred in Washington State. CP 44, 48. Therefore, under the law of the case doctrine, the State was required to prove this element beyond a reasonable doubt. The

remedy for its failure to do so is reversal and dismissal with prejudice.

E. CONCLUSION

The evidence was insufficient to prove the critical fact of the State's jurisdiction over the alleged offenses. No rational jury could have found, beyond a reasonable doubt, that either offense occurred in Washington. This Court must therefore reverse both convictions and dismiss them with prejudice.

In the event this Court finds the evidence was insufficient as to only one count, it must reverse the conviction on that count, dismiss that count with prejudice, and remand for resentencing.

I certify that this document was prepared using word processing software and contains 6,311 words excluding the parts exempted by RAP 18.17.

DATED this 30th day of September, 2022.

Respectfully submitted,

NIELSEN KOCH, PLLC

ERIN MOODY

WSBA No. 45570
Office ID No. 91051
Attorney for Appellant

NIELSEN KOCH, PLLC

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